

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	No. 19-3716
)	
v.)	Board Case No.
)	02-CA-235116
RM BAKERY, LLC D/B/A)	
LEAVEN & CO., A WHOLLY-OWNED)	
SUBSIDIARY OF BKD GROUP, LLC)	
)	
Respondent)	
)	

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD
TO RESPONDENT’S MOTION TO RECALL THE MANDATE**

To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:

The National Labor Relations Board opposes the motion of RM Bakery, LLC d/b/a Leaven & Co., a Wholly Owned Subsidiary of BKD Group, LLC. (“the Company”) to recall the mandate. It is well established that recall of a mandate is an extraordinary remedy to be granted only in exceptional cases. This is not such a case. Rather, the Company offers the weakest of excuses for its repeated failure to take the basic steps needed to respond to the Board and court proceedings, despite multiple entreaties and reminders and ample notice, including to its Executive Vice-President. The Court should therefore deny the Company’s motion, which essentially seeks a do-over of both proceedings.

PROCEDURAL BACKGROUND

A. The Board Proceeding

1. On February 4, 2019, the Board's Regional Office for Region 2 served a letter and copy of an unfair-labor-practice charge filed against the Company alleging that it had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), by discharging five employees. The Region served both documents by regular mail on the Company's Executive Vice-President, Dan Wilczynski. (Attachment A.) In its letter, the Region urged the Executive Vice-President or his representative to contact the Board agent assigned to investigate the charge, and "to submit a complete written account of the facts and a statement of [its] position with respect to the allegations in the charge as soon as possible." (Attachment A.) Neither the Executive Vice President, nor any other company representative, responded to the Region's request for cooperation and information.

2. Between February 14 and March 11, the Regional Office also attempted to reach the Company by other means. The Region sent Chief Financial Officer Norman Rich several emails and managed to reach him once by telephone, in a conversation where he asserted that the discharged employees were independent contractors not covered by the Act.

3. On March 19, the Board's Regional Office sent Executive Vice President Wilczynski and Chief Financial Officer Rich a follow-up letter by regular mail,

noting that it had attempted to contact them “numerous times without success.” In its letter, the Region again asked the Company to provide a position statement regarding the allegations that it had unlawfully discharged the five employees, and to answer 13 specific questions regarding its apparent claim that the five were independent contractors. The Region gave the Company until March 28 to provide its evidence and a position statement. (Attachment B.) Neither the Executive Vice-President, nor any other company representative, responded to the Region’s entreaty.

4. On April 3, the Regional Office served Executive Vice-President Wilczynski by regular mail with a letter and an amended unfair-labor-practice charge filed against the Company. In its letter, the Region reiterated its request for information regarding the allegations. (Attachment C.) Once again, neither the Executive Vice-President, nor any other company representative, responded to this request.

5. On April 19, the Regional Office sent Executive Vice-President Wilczynski and Chief Financial Officer Rich a follow-up letter, noting that the Region had made “numerous” attempts to reach them, and giving the Company until April 25 to submit evidence and a position statement. (Attachment D.) Neither the Executive Vice-President nor Rich responded to this request, aside from the latter submitting an incomplete response to the Region’s commerce

questionnaire. Accordingly, on May 14, the Region issued by certified mail a subpoena duces tecum directing the Company to provide the requisite commerce information, which it did.

6. Thereafter, the Regional Office, having received no written response from the Company other than its commerce questionnaire, proceeded to investigate the charges based on the available evidence, which included employee affidavits and documentation.

7. After evaluating those affidavits and documents and completing its investigation, the Region found sufficient evidence to issue a complaint and notice of hearing alleging that the Company violated Section 8(a)(1) of the Act. On June 10, the Region duly served the complaint and notice by certified mail on Executive Vice-President Wilczynski. The complaint noted, in relevant part, that under the Board's Rules and Regulations, the Company was required to file an answer by June 24, 2019, and that if it failed to do so the allegations in the complaint would be deemed true. (Attachment E.)

8. The Company, however, did not file an answer, even though Executive Vice-President Wilczynski had been duly served by certified mail with the complaint, which specifically noted the consequences of failing to file an answer. Accordingly, the Regional Office sent Executive Vice-President Wilczynski a letter by regular mail on June 24, with a copy by email to the Chief Financial

Officer, advising the Company that if no answer was filed by July 1, the Region would file a Motion for Default Judgment with the Board. (Attachment F.)

Despite this further notice and warning, the Company did nothing.

9. On July 8, having received no answer, the General Counsel filed with the Board a Motion to Transfer Proceedings to the Board and for Default Judgment based upon the Company's failure to file an answer to the complaint. In its Motion, the General Counsel explained that pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations, 29 C.F.R. § 102.24 and 102.50, default judgment should be entered based on the Company's failure to file an answer as prescribed by Section 102.20, 29 C.F.R. § 102.20. The General Counsel also argued that because the Company had been duly served and failed to file an answer, all allegations in the complaint should be admitted and found to be true. *See Local 297, National Postal Mailhandlers Union*, 367 NLRB No. 144 (2019), 2019 WL 2372862, at *1. The Board duly served the motion by regular mail on Executive Vice-President Wilczynski and a copy by email to the Chief Financial Officer. (Attachment G.)

10. On July 10, the Board issued an order transferring the case to itself and a Notice to Show Cause, giving the Company until July 24 to file a response to the Motion for Default Judgment. The Board served its order and Notice to Show

Cause by certified and regular mail on Executive Vice-President Wilczynski.

(Attachment H.)

11. The Company, however, ignored the General Counsel's Motion and the Board's Notice to Show Cause—even though both had been duly served, in accordance with the Board's Rules and Regulations, on Executive Vice-President Wilczynski by certified and regular mail. Accordingly, on August 5, the Board's General Counsel filed with the Board a Motion to Expedite Default Judgment and Board Order. The Board served the Motion by regular mail on Executive Vice-President Wilczynski and a copy by email to Rich. (Attachment I.)

12. Neither Executive Vice-President Wilczynski, nor any other company representative, responded to the General Counsel's motion to expedite, despite having been duly served. Accordingly, having received no answer, the Board issued its Decision and Order on October 8, 2019, granting the General Counsel's motion for summary judgment, and finding that the Company violated the Act, as alleged, by discharging the five employees. The Board's Order directs the Company to, among other things, offer reinstatement to the five employees and make them whole for any loss of earnings due to their unlawful discharge.

(Attachment J.)

13. In accordance with its Rules and Regulations, the Board served its October 8 Decision and Order on Executive Vice-President Wilczynski by certified

and regular mail. (Attachment J.) Thereafter, on October 15, the Regional Office sent two letters to the Company, one addressed to Executive Vice-President Wilczynski, and another to him and Rich. Both letters inquired whether the Company planned to comply with the Board's Order and noted that, absent compliance, the Board would potentially seek enforcement before the appropriate United States Court of Appeals. (Attachments K, L.) On October 29 and November 5, the Regional Office sent Executive Vice-President Wilczynski additional letters, asking again whether the Company planned to comply with the Board's Order. (Attachment M.)

14. Despite having been duly served by certified and regular mail with the Board's Decision and Order, and by regular mail with the Region's four follow-up letters, neither Executive Vice-President Wilczynski, nor any other company representative, responded. Instead, the Board and its Regional Office continued to be met with radio silence.

B. The Court Proceeding

1. On November 6, 2019, the Board's Acting Deputy Associate General Counsel filed with the Court an application for summary entry of a judgment enforcing the Board's Order and a proposed judgment. The Board duly served a copy on Vice-President Wilczynski and Chief Financial Officer Rich by regular mail, in accordance with Rule 3(d) of the Federal Rules of Appellate Procedure. In

its application, the Board explained that under its Rules and Regulations, it is entitled to summary enforcement where, as here, a charged party has failed to file an answer to the complaint. The Board also explained that under Section 10(e) of the Act, 29 U.S.C. §160(e), no objection that has not been urged before the Board shall be considered by the Court absent extraordinary circumstances, which were not alleged or demonstrated here. As the Board also explained, this Court and its sister circuits have consistently interpreted this requirement to hold that a respondent's failure to assert any defense before the Board (such as not filing an answer), entitles the Board to summary enforcement of its Order. *See, e.g., KBI Security Serv., Inc. v. NLRB*, 91 F.3d 291, 295 (2d Cir. 1996). (Attachment N.)

2. On November 8, the Court duly served a copy of the Board's enforcement application on the Company, in accordance with Rule 15(c) of the Federal Rules of Appellate Procedure. (Attachment O.) The Court also issued a notice to the Company stating that a corporation is barred from proceeding pro se and absent an attorney filing a notice of appearance for the Company by December 9, the Company would be deemed in default on appeal. (Attachment P.)

3. No attorney filed an appearance on behalf of the Company, which did not respond to the Court's notice. Accordingly, on December 27, the Court issued a judgement enforcing the Board's Order and mandate issued forthwith. (Attachment Q.)

4. It was not until February 10, 2020, that counsel for the Company belatedly filed a notice of appearance. On February 13, the Company filed the instant motion to recall the Court's mandate.

ARGUMENT

The Company does not deny that over nearly a one-year period, it was properly served, through its Executive Vice-President, by the Board and the Court with the full panoply of pleadings and motions that resulted in the judgment and mandate against it, and that despite this clear notice it utterly failed to respond. It also concedes (Motion p. 3) that it was “generally aware” of the Board proceedings against it and does not deny its failure to participate despite ample opportunities to do so. Nevertheless, the Company now asks the Court to take the extraordinary step of recalling its mandate. In effect, the Company seeks a double do-over by asking the Court to not only recall the mandate but also to remand the case to the Board for reconsideration of its October 8, 2019 Decision and Order granting a default judgment. As shown below, the Company fails to show that it is entitled to the extraordinary relief it seeks.

1. Although the Court has inherent authority to recall its mandate, *United States v. Redd*, 735 F.3d 88, 90 (2d Cir. 2013), such power is to be exercised sparingly, and reserved for exceptional circumstances, given “‘the profound interests in repose’ that attach to the mandate of a court of appeals.” *Bottone v.*

United States, 350 F.3d 59, 62 (2d Cir. 2003) (quoting *Calderon v. Thompson*, 523 U.S. 538, 550 (1998)); *see also Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996). Thus, the recall power is effectively one “of last resort, to be held in reserve against grave, unforeseen contingencies,” such as a supervening change in governing law that calls into serious question the correctness of the Court’s judgment. *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 709 F.3d 140, 142 (2d Cir. 2013) (internal quotation marks and citations omitted). The Company, however, has not demonstrated exceptional circumstances or grave, unforeseen contingencies necessary to warrant recalling the mandate.

2. As an initial matter, the Company does not dispute that the Board properly served it with all the relevant documents in the proceedings below via certified and/or regular mail on Executive Vice-President Wilczynski, and also served some of those documents on the Chief Financial Officer. *See, e.g., Local 07, National Postal Mailhandlers Union AFL-CIO*, 367 NLRB No. 144 (2019), 2019 WL 2372862, at *1 (under Section 102.4(a) of the Board’s Rules and Regulations, 29 C.F.R. § 102.4(a), certified mail is a proper method of serving a complaint); *Transdev Serv., Inc.*, 368 NLRB No. 12 (2019), 2019 WL 2551758, at *3 (under Section 102.4(c), regular and certified mail are proper methods of serving a notice to show cause and other documents). Nevertheless, the Company

failed to respond, forgoing numerous opportunities to participate in the Board proceedings.

Importantly, the Company failed to file an answer to the complaint despite the General Counsel specifically informing it that under the Board's Rules and Regulations, its failure to timely file an answer could lead the Board to find, pursuant to a Motion for Default Judgment, that the complaint allegations are true. Likewise, the Company failed to file a response to the notice to show cause. The Company's inaction ultimately led the Board to issue a Decision and Order granting the Board's General Counsel's motion for summary judgment—an Order that the Board duly served on Executive Vice-President Wilczynski by certified and regular mail.

3. Similarly, the Company does not dispute that the Board properly served it with all the relevant documents in the proceeding before the Court. Thus, the Company does not dispute that pursuant to Rule 3(d) of the Federal Rules of Appellate Procedure, the Board correctly served the application for summary entry of judgment on Executive Vice-President Wilczynski, as well as the Chief Financial Officer. Nor does the Company dispute that the Court duly served it with a copy of the Board's application. Nevertheless, the Company thereafter failed to comply with Rule 15(b) of the Federal Rules of Appellate Procedure,

which required it, within 21 days of the filing of the Board's application, to "serve on the applicant an answer to the application and file it with the clerk."

Despite the Company's failure to timely file an answer, the Court gave the Company yet another opportunity to participate in the proceeding by notifying the Company that that it would be in default absent an attorney filing an appearance form on its behalf. Still, the Company did nothing. Only after the Company failed to comply with the Court's requirement to have an attorney file an appearance did the Court summarily enforce the Board's Order. The Court's judgment was fully consistent with Rule 15(b) of the Federal Rules of Appellate Procedure, which provides that absent the filing of an answer, "the Court will enter judgment for the relief requested."

4. Although there is no dispute that it was properly served with all the relevant documents at every step of the way, the Company nevertheless asks the Court to recall its mandate, painting itself as a victim through no "fault of its own." (Motion pp. 3-7.) According to the Company, it had tasked Chief Financial Officer Rich with handling the proceedings, and he intentionally or unintentionally led the Company to believe that he was doing so when he was not. This allegation, however, falls far short of demonstrating the extraordinary circumstances necessary to recall a mandate.

In the first place, the Company offers no authority for its claim that alleged omissions by an officer of a limited liability corporation constitute an extraordinary circumstance warranting a recall of mandate. To the contrary, the Company admits (Motion p. 7) that it is unaware of any court recalling mandate on such grounds. The only cases cited by the Company—*Calloway v. Marvel Entertainment Group*, 854 F.2d 1452 (1988), *reversed in part on other grounds*, 493 U.S. 120 (1989), and *Bennett v. Mukasey*, 525 F.3d 222 (2d Cir. 2008)—both involve attorney malfeasance, are entirely distinguishable, and have no relevance here.

In *Calloway*, 854 F.2d at 1473, the Court recalled the mandate and reinstated Calloway’s pro se appeal, which had been dismissed for failure to prosecute, in order to remand for a determination regarding the relative liability of Calloway and the law firm that represented him for conduct violating Rule 11 and the allocation of sanctions between them. The Court’s decision hinged on its finding that the “entire Rule 11 proceeding against Calloway was thoroughly tainted by his attorneys’ failure to withdraw from representation” despite their “blatant” and “self-evident” conflict of interest. *Id.* at 1456, 1473, 1475. As the Court aptly noted, the attorneys’ financial interest in avoiding their share of Rule 11 sanctions was adverse to Calloway’s interest in holding them jointly and severally liable for those sanctions. *Id.* at 1475-76. Based on these extenuating circumstances, the

Court's determined that "[t]he danger of a manifest injustice therefore exists." *Id.* Needless to say, no such conflicts of interest are present here.

Bennett is likewise inapplicable. In that case, the Court recalled a mandate and reinstated a petition for review of a decision of the Board of Immigration Appeals because the attorney had violated the Lawyer's Code of Professional Responsibility by "accepting an initial retainer fee and then deliberately failing to take required action because of non-payment of additional fees, thereby permitting his client's petition to be dismissed." 525 F.3d at 223. No such attorney malfeasance is present here.

5. The Company gains no more ground by suggesting that its chief financial officer, Rich, owed it a fiduciary duty which he breached by neglecting the Board and Court proceedings. (Motion p. 7.) The Company cites nothing to support its suggestion that an officer of a limited liability corporation incorporated in the State of Delaware owes such a duty, and, more importantly, that breaching such a duty gets his employer off the hook.¹ But even if Rich did have such an obligation, under the Company's argument that duty of care would apply with equal force to Executive Vice-President Wilczynski, who was properly served with all the

¹ In his response to the Board's commerce questionnaire, Rich admitted that the Company is a Delaware LLC. *See also* D&O 1. Accordingly, the Company does not help itself by citing *Bullard v. Drug Policy Alliance*, 2019 WL 7291226, at *6 (S.D.N.Y. Dec. 30, 2019), which applied New York law and did not involve an LLC.

relevant documents.² In short, the Company’s argument is too clever by half, because if Rich owed it a fiduciary duty to handle the litigation properly then so did Executive Vice-President Wilczynski. But even if the Company were to pursue a cause of action against its officers, that would not relieve it of liability for the unfair labor practices here.³

Ignoring this obvious flaw in its argument, the Company offers only the lame excuse that Executive Vice-President Wilczynski “worked primarily on the production floor” and “was not apprised of any mail to him.” (Motion p. 5.) But a corporate officer’s failure to monitor mail addressed directly to him, much of which was sent by certified mail over a year-long litigation process, hardly constitutes an extraordinary circumstance that warrants recalling the Court’s mandate.⁴ After all, even if the Executive Vice-President neglected his certified mail, that would not excuse the Company from liability.

² Given that the Board served all the relevant documents on Executive Vice-President Wilczynski, the Company’s suggestion (Motion p. 5) that the Board only served Rich is specious.

³ The Company forgets that it is not without other remedies. For instance, its members could bring a direct or derivative lawsuit on the LLC’s behalf against its officers for breach of contractual duties. *See* 6 Del. C. §18-1001; *Elf Atochem N. Am, Inc. v. Jaffari*, 727 A.2d 286, 293-94 (Del. 1999).

⁴ Notably, the Company admits that before the Court issued its judgment and mandate, Executive Vice-President Wilczynski spoke with a Board employee regarding the matter. (Motion p. 3.) Yet, he took no action. His apparent failure to make any effort to clarify who he was speaking with or the subject of their discussion is no basis for recalling the mandate.

6. The Company's claim (Motion pp. 1-2, 7-10) that it could have prevailed on the merits below by showing the discharged employees were independent contractors comes far too late. As shown, it had had ample opportunities to litigate the issue at the time appropriate under the Board's practices. Thus, it could have responded to the Regional Office's multiple entreaties for information and a position statement during the Region's investigation of the charges. Likewise, the Company could have responded to the complaint and sought a hearing before the Board. And thereafter, the Company could have responded to the General Counsel's Notice to Show Cause and Motion for Summary judgment. At this juncture, however, the Company's attempt to litigate the independent contractor issue has long since passed. *See NLRB v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice"); *accord New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 192 (2d Cir. 2006).

The Company also ignores the obvious stumbling block that even if the Court were to take the extraordinary step of recalling the mandate, and also remand the case to the Board, it would then have to convince the Board to vacate the Decision and Order granting summary judgment. But because it is undisputed that

the Board properly served the Company through its Executive Vice-President with all relevant documents, the Company offers no basis for asking the Board to vacate its ruling.

7. Finally, there is no merit to the Company's claim (Motion p. 13) that the equities favor a recall of mandate. In asking the Court to take that extraordinary step, the Company essentially seeks a double do-over—to have the Court unravel a litigation process that has already lasted over a year and start the case anew before the Board, causing further delay for the wrongfully discharged employees. The equities hardly favor such a result, given that the Board properly followed its Rules and Regulations regarding service and the Company had ample opportunities to raise its independent contractor defense at the appropriate time under those rules. Given the Company's failure to avail itself of those opportunities, it is hardly inequitable for the Court to keep its mandate intact, foreclosing the Company's belated attempt to litigate its defense.

To the extent the Company claims it will suffer an injustice by virtue of the Court's entry of default judgment, the default is a situation of its own making. The Company could have, but did not, take any of the basic steps necessary to litigate its defense throughout the proceedings, despite multiple reminders and ample opportunities to do so. Its omissions are no reason to deny the unlawfully

discharged employees the relief they are due under the Board's Decision and Order.⁵

WHEREFORE, the Board respectfully requests that the Court deny the Company's motion to recall the mandate.

Respectfully submitted,

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 24th day of February 2020

⁵ To be sure, in the compliance phase of these proceedings, the Company can dispute the Board's specific calculations of backpay owed to the five discharged employees and litigate defenses that could mitigate its backpay liability, such as the validity of any reinstatement offers it might have made. The Company, however, would be precluded from relitigating the Board's underlying unfair labor practice findings and claiming that the discriminatees were independent contractors rather than employees under the Act.

**UNITED STATES COURT OF APPEALS
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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

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Agency Website: www.nlr.gov
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February 4, 2019

Leaven & Co.
Attn: Dan Wilczynski
220 Coster Street
Bronx, NY 10474

Re: Leaven & Co.
Case No. 02-CA-235116

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney JOSEPH LUHRS whose telephone number is (212)776-8626. If this Board agent is not available, you may contact Deputy Regional Attorney GEOFFREY DUNHAM whose telephone number is (212)776-8609.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing *Form NLRB-4701, Notice of Appearance*. This form is available on our website, www.nlr.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly. **Due to the nature of the allegations in the enclosed unfair labor practice charge, we have identified this case as one in which injunctive relief pursuant to Section 10(j) of the Act may be appropriate.** Therefore, in addition to investigating the merits of the unfair labor practice allegations, the Board agent will also inquire into those factors relevant to making a determination as to whether or not 10(j) injunctive relief is appropriate in this case. Accordingly,

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Leaven & Co.
Case No. 02-CA-235116

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please include your position on the appropriateness of Section 10(j) relief when you submit your evidence relevant to the investigation.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Preservation of all Potential Evidence: Please be mindful of your obligation to preserve all relevant documents and electronically stored information (ESI) in this case, and to take all steps necessary to avoid the inadvertent loss of information in your possession, custody or control. Relevant information includes, but is not limited to, paper documents and all ESI (e.g. SMS text messages, electronic documents, emails, and any data created by proprietary software tools) related to the above-captioned case.

Prohibition on Recording Affidavit Interviews: It is the policy of the General Counsel to prohibit affiants from recording the interview conducted by Board agents when subscribing Agency affidavits. Such recordings may impede the Agency's ability to safeguard the confidentiality of the affidavit itself, protect the privacy of the affiant and potentially compromise the integrity of the Region's investigation.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website, www.nlr.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge. The Agency requests all evidence submitted electronically to be in the form it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native

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format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlr.gov or from an NLRB office upon your request. *NLRB Form 4541, Investigative Procedures* offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "John J. Walsh, Jr.", written in a cursive style.

John J. Walsh, Jr.
Regional Director

Enclosures:

1. Copy of Charge
2. Commerce Questionnaire

Revised 3/21/2011		NATIONAL LABOR RELATIONS BOARD	
QUESTIONNAIRE ON COMMERCE INFORMATION			
Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.			
CASE NAME Leaven & Co.		CASE NUMBER 02-CA-235116	
1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)			
2. TYPE OF ENTITY			
<input type="checkbox"/> CORPORATION <input type="checkbox"/> LLC <input type="checkbox"/> LLP <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> SOLE PROPRIETORSHIP <input type="checkbox"/> OTHER (Specify)			
3. IF A CORPORATION or LLC			
A. STATE OF INCORPORATION OR FORMATION		B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES	
4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS			
5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR			
6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed).			
7. A. PRINCIPAL LOCATION:		B. BRANCH LOCATIONS:	
8. NUMBER OF PEOPLE PRESENTLY EMPLOYED			
A. Total:		B. At the address involved in this matter:	
9. DURING THE MOST RECENT (Check appropriate box): <input type="checkbox"/> CALENDAR YR <input type="checkbox"/> 12 MONTHS or <input type="checkbox"/> FISCAL YR (FY dates)			
			YES NO
A. Did you provide services valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value. \$			
B. If you answered no to 9A, did you provide services valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided. \$			
C. If you answered no to 9A and 9B, did you provide services valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$			
D. Did you sell goods valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$			
E. If you answered no to 9D, did you sell goods valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$			
F. Did you purchase and receive goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$			
G. Did you purchase and receive goods valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$			
H. Gross Revenues from all sales or performance of services (Check the largest amount): <input type="checkbox"/> \$100,000 <input type="checkbox"/> \$250,000 <input type="checkbox"/> \$500,000 <input type="checkbox"/> \$1,000,000 or more If less than \$100,000, indicate amount.			
I. Did you begin operations within the last 12 months? If yes, specify date: _____			
10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?			
<input type="checkbox"/> YES <input type="checkbox"/> NO (If yes, name and address of association or group).			
11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS			
NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER
12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE			
NAME AND TITLE (Type or Print)	SIGNATURE	E-MAIL ADDRESS	DATE
PRIVACY ACT STATEMENT			
Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.			

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEAVEN & CO.

Charged Party

and

MAKE THE ROAD NEW YORK

Charging Party

Case No. 02-CA-235116

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I Robin Brown-Dawkins, the undersigned employee of the National Labor Relations Board, state under oath that on February 4, 2019, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

Leaven & Co.
Attn: Dan Wilczynski
220 Coster Street
Bronx, NY 10474

February 4, 2019

Date

Robin Brown-Dawkins, Designated Agent
of NLRB

Name

Signature



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 2
26 Federal Plz Ste 3614
New York, NY 10278-3699

Agency Website: www.nlr.gov
Telephone: (212)264-0300
Fax: (212)264-2450

Agent's Direct Dial: (212)776-8626

March 19, 2019

Dan Wilczynski
Norman Rich
Leaven & Co.
220 Coster Street
Bronx, NY 10474

Re: Leaven & Co.
Case 02-CA-235116

Dear Mr. Wilczynski & Mr. Rich:

I have attempted to reach you numerous times without success, so I am writing this letter to advise you that it is now necessary for me to take evidence from you regarding the allegations raised in the investigation of the above-captioned matter.

Allegations: The allegations for which I am seeking your evidence are as follows.

"On or about October 10, 2018, the above named employer discriminated against its employees Juan Abarea, Clayton Brown, Nestor Marquez, Rene Moran, and Gilberto Paniura by discharging them in retaliation for their protected concerted activity and/or to discourage such activity."

The NLRB does not have jurisdiction over independent contractors. However, the assertion that an individual was an independent contractor or a contract declaring that individual to be an independent contractor are insufficient evidence of independent contractor status. Rather, per *Supershuttle DFW, Inc.*, 367 NLRB No. 75 (2019), the NLRB looks at questions such as the following:

- Is the individual free to reject work for the employer without breaking the terms of their agreement?
- Is this individual's work part of the normal business of the employer, i.e., does the employer regularly use this individual as part of the business operation? Is the individual employed for a particular length of time? Is the individual's work continuous and regular? Is the individual's work based on a particular "project" that is limited in duration?
- Who determines the amount and method of payment? Is it negotiated between the employer and the individual? Is it predetermined by the employer? Is there anything the individual can do to vary the amount of payment? If so, what?

Leaven & Co.
Case 02-CA-235116

- 2 -

March 19, 2019

- Does the employer deduct FICA or withholding taxes on behalf of the individual?
- Who supervises the individual? What is the nature of the supervision?
- Does the individual have to report to employer officials on a daily basis? How does the employer mandate the number of hours worked per day or per week?
- Can the individual establish his/her own schedule?
- Does the individual have an opportunity to affect his/her income by cultivating business or customers?
- Does or could the individual hire others to perform work for the employer?
- Does the individual use all or part of the employer's facilities?
- Is the individual free to contact and perform work for or sell goods of another employer using his employees or equipment? Is the individual subjected to any penalty, monetary or otherwise, if work is performed for any other employer?
- Is the individual free to sell or transfer his job, lease or service area? Are there any penalties if the individual transfers, sells or leases the job or service area to another individual? If so, describe the nature of the penalties.
- Can this individual extend credit to customers without the employer's permission? Is there a limit on the extension of credit?

Please provide the answers to the preceding questions in your position statement, along with you position on the allegation that the discriminatees were terminated for their participation in protected concerted activity. Additionally, please provide all evidence which would support your contention that the named discriminatees are independent contractors.

Position on 10(j) Relief: You are also requested to provide your position as to the appropriateness of Section 10(j) injunctive relief in this matter. As you may know, Section 10(j) of the Act permits the NLRB to ask a federal district court "for appropriate temporary relief or restraining order" pending the Board's resolution of an unfair labor practice charge. The district court is authorized to grant "such temporary relief or restraining order as it deems just and proper." *If* the Region determines the Charged Party has violated the Act as alleged, the Region will consider whether to seek injunctive relief in this matter. Accordingly, please provide your position, legal theory, case law, and supporting evidence regarding whether injunctive relief would be appropriate for the alleged violations in this case and whether such injunctive relief would be just and proper. I wish to emphasize that the Region has not yet made a decision as to whether the Charged Party has violated the Act as alleged. Rather, we want to provide you with adequate notice that injunctive relief will be considered if such a decision is made.

Date for Submitting Evidence: To resolve this matter as expeditiously as possible, you must provide your evidence and position in this matter **Friday, March 29, 2019**. Electronic

Leaven & Co.
Case 02-CA-235116

- 3 -

March 19, 2019

filing of position statements and documentary evidence through the Agency website is preferred but not required. To file electronically, go to www.nlr.gov, select **E-File Documents**, enter the **NLRB case number**, and follow the detailed instructions. If I have not received all your evidence by the due date or spoken with you and agreed to another date, it will be necessary for me to make my recommendations based upon the information available to me at that time.

Please contact me at your earliest convenience by telephone, (212)776-8626, or e-mail, joseph.luhrs@nlrb.gov, so that we can discuss how you would like to provide evidence and I can answer any questions you have with regard to the issues in this matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. Luhrs", is written above the typed name.

Joseph Luhrs
Field Attorney



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 2
26 Federal Plz Ste 3614
New York, NY 10278-3699

Agency Website: www.nlr.gov
Telephone: (212)264-0300
Fax: (212)264-2450



Download
NLRB
Mobile App

April 3, 2019

Leaven & Co., a wholly-owned subsidiary
of BKD Group
Attn.: Dan Wilczynski
220 Coster Street
Bronx, NY 10474

Re: Leaven & Co., a wholly-owned subsidiary
of BKD Group
Case No. 02-CA-235116

Dear Mr. Wilczynski:

Enclosed is a copy of the first amended charge that has been filed in this case.

Investigator: This charge is being investigated by Field Attorney Joseph Luhrs whose telephone number is (212)776-8626. If the agent is not available, you may contact Supervisory Field Attorney GEOFFREY DUNHAM whose telephone number is (212)776-8609.

Presentation of Your Evidence: As you know, we seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations in the first amended charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Preservation of all Potential Evidence: Please be mindful of your obligation to preserve all relevant documents and electronically stored information (ESI) in this case, and to take all steps necessary to avoid the inadvertent loss of information in your possession, custody or control. Relevant information includes, but is not limited to, paper documents and all ESI (e.g. SMS text messages, electronic documents, emails, and any data created by proprietary software tools) related to the above-captioned case.

Prohibition on Recording Affidavit Interviews: It is the policy of the General Counsel to prohibit affiants from recording the interview conducted by Board agents when subscribing Agency affidavits. Such recordings may impede the Agency's ability to safeguard the confidentiality of the affidavit itself, protect the privacy of the affiant and potentially compromise the integrity of the Region's investigation.

Procedures: Your right to representation, the means of presenting evidence, and a description of our procedures, including how to submit documents, was described in the letter sent to you with the original charge in this matter. If you have any questions, please contact the

C

Leaven & Co., wholly-owned subsidiary of - 2 -
BKD Group
Case No. 02-CA-235116

April 3, 2019

Board agent. The Agency requests all evidence submitted electronically to be in the form it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the charge.

Very truly yours,

A handwritten signature in black ink, appearing to read "John J. Walsh, Jr.", written in a cursive style.

JOHN J. WALSH, JR.
Regional Director

Enclosure: Copy of first amended charge

Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
AMENDED CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
02-CA-235116	04/01/2019

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Leaven & Co., a wholly-owned subsidiary of BKD Group		b. Tel. No. (718)472-3036
		c. Cell No.
d. Address (street, city, state ZIP code) 220 Coster Street, Bronx, NY 10474	e. Employer Representative Dan Wilczynski	f. Fax No. (718)472-3037
		g. e-Mail
		h. Dispute Location (City and State) Bronx, NY
i. Type of Establishment (factory, nursing home, hotel) Bakery	j. Principal Product or Service Baked goods	k. Number of workers at dispute location 30

1. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

On or about October 10, 2018, the above named employer discriminated against its employees Juan Abarca, Clayton Brown, Nestor Marquez, Rene Moran, and Gilberto Paniura by discharging them in retaliation for their protected concerted activity and or to discourage such activity.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

Make The Road New York

4a. Address (street and number, city, state, and ZIP code)
46 Waller Avenue, White Plains, NY 10605

RECEIVED
APR 01 2019

BY: _____

4b. Tel. No.
(914)948-8466
4c. Cell No.
4d. Fax No.
(914)948-0311
4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)**6. DECLARATION**

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

Tel. No.
(914)948-8466

Office, if any, Cell No.

By: *Sarah Leberstein*
(signature of representative or person making charge)

Sarah Leberstein, Esq.
Print Name and Title

Fax No.
(914)948-0311

Address: 46 Waller Avenue, White Plains, NY 10605

Date: March 27, 2019

e-Mail
sarah.leberstein@maketheroadny.org

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**LEAVEN & CO., A WHOLLY-OWNED
SUBSIDIARY OF BKD GROUP**

Charged Party

and

MAKE THE ROAD NEW YORK

Charging Party

Case No. 02-CA-235116

AFFIDAVIT OF SERVICE OF FIRST AMENDED CHARGE AGAINST EMPLOYER

I, Wanda L. Spratley, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on Wednesday, April 3, 2019, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

Leaven & Co., a wholly-owned subsidiary of
BKD Group
Attn.: Dan Wilczynski
220 Coster Street
Bronx, NY 10474

April 3, 2019

Date

Wanda L. Spratley,
Designated Agent of NLRB

Name

Signature



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 2
26 Federal Plz Ste 3614
New York, NY 10278-3699

Agency Website: www.nlrb.gov
Telephone: (212)264-0300
Fax: (212)264-2450

Agent's Direct Dial: (212)776-8626

April 19, 2019

Dan Wilczynski
Norman Rich
Leaven & Co., a wholly-owned subsidiary of BKD Group
220 Coster Street
Bronx, NY 10474

Re: Leaven & Co., a wholly-owned subsidiary
of BKD Group
Case 02-CA-235116

Dear Messrs. Wilczynski and Rich:

I have attempted to reach you without success on numerous occasions. I am writing to you as a final request to provide the evidence originally requested in my letter dated March 19, 2019. Furthermore, I am seeking additional evidence related to the allegations as outlined below. Please submit all evidence no later than **Thursday, April 25, 2019 at noon**. You may submit your evidence by email, fax, or e-filing.

Documents: Please provide the following documents, along with any and all other evidence you deem to be relevant to the case:

1. Complete and return the attached Commerce Questionnaire.
2. The position statement requested in the March 19, 2019 letter, see attached.
3. The personnel files of Juan Abarca, Clayton Brown, Nestor Marquez, Rene Moran, and Gilberto Paniura.
4. All tax documents related to Juan Abarca, Clayton Brown, Nestor Marquez, Rene Moran, and Gilberto Paniura.
5. All documents related to the terms of employment of Juan Abarca, Clayton Brown, Nestor Marquez, Rene Moran, and Gilberto Paniura or to the terms in which Juan Abarca, Clayton Brown, Nestor Marquez, Rene Moran, and Gilberto Paniura provided services to Leaven & Co.
6. Any employment manuals maintained by Bkd. Group and/or Leaven & Co.

Date for Submitting Evidence: To resolve this matter as expeditiously as possible, you must provide your evidence and position in this matter no later than **Thursday, April 25, 2019 at noon**. Electronic filing of position statements and documentary evidence through the Agency

Leaven & Co., a wholly-owned subsidiary - 2 -
of BKD Group
Case 02-CA-235116

April 19, 2019

website is preferred but not required. To file electronically, go to **www.nlrb.gov**, select **E-File Documents**, enter the **NLRB case number**, and follow the detailed instructions. If I have not received all your evidence by the due date or spoken with you and agreed to another date, it will be necessary for me to make my recommendations based upon the information available to me at that time.

Please contact me at your earliest convenience by telephone, (212)776-8626, or e-mail, joseph.luhrs@nlrb.gov, so that we can discuss how you would like to provide evidence and I can answer any questions you have with regard to the issues in this matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "J. Luhrs", written in a cursive style.

Joseph Luhrs
Field Attorney

Revised 3/21/2011		NATIONAL LABOR RELATIONS BOARD		
QUESTIONNAIRE ON COMMERCE INFORMATION				
Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.				
CASE NAME Leaven & Co.		CASE NUMBER 02-CA-235116		
1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)				
2. TYPE OF ENTITY				
<input type="checkbox"/> CORPORATION <input type="checkbox"/> LLC <input type="checkbox"/> LLP <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> SOLE PROPRIETORSHIP <input type="checkbox"/> OTHER (Specify)				
3. IF A CORPORATION or LLC				
A. STATE OF INCORPORATION OR FORMATION		B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES		
4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS				
5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR				
6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed).				
7. A. PRINCIPAL LOCATION:		B. BRANCH LOCATIONS:		
8. NUMBER OF PEOPLE PRESENTLY EMPLOYED				
A. Total:		B. At the address involved in this matter:		
9. DURING THE MOST RECENT (Check appropriate box): <input type="checkbox"/> CALENDAR YR <input type="checkbox"/> 12 MONTHS or <input type="checkbox"/> FISCAL YR (FY dates)				
			YES	NO
A. Did you provide services valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value. \$				
B. If you answered no to 9A, did you provide services valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided. \$				
C. If you answered no to 9A and 9B, did you provide services valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$				
D. Did you sell goods valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$				
E. If you answered no to 9D, did you sell goods valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$				
F. Did you purchase and receive goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$				
G. Did you purchase and receive goods valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$				
H. Gross Revenues from all sales or performance of services (Check the largest amount): <input type="checkbox"/> \$100,000 <input type="checkbox"/> \$250,000 <input type="checkbox"/> \$500,000 <input type="checkbox"/> \$1,000,000 or more If less than \$100,000, indicate amount.				
I. Did you begin operations within the last 12 months? If yes, specify date: _____				
10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?				
<input type="checkbox"/> YES <input type="checkbox"/> NO (If yes, name and address of association or group).				
11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS				
NAME		TITLE		E-MAIL ADDRESS
NAME AND TITLE (Type or Print)		SIGNATURE		E-MAIL ADDRESS
NAME AND TITLE (Type or Print)		SIGNATURE		DATE
12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE				
PRIVACY ACT STATEMENT				
Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.				

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**RM BAKERY, LLC, D/B/A/ LEAVEN & CO.,
A WHOLLY-OWNED SUBSIDIARY OF
BKD GROUP, LLC**

AND

Case No. 02-CA-235116

MAKE THE ROAD NEW YORK

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Make the Road New York (Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that RM Bakery, LLC, d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC (Respondent) has violated the Act as described below.¹

1. (a) The charge in this proceeding was filed by the Charging Party on January 30, 2019, and a copy was served on Respondent by U.S. mail on February 4, 2019.

(b) The first amended charge in this proceeding was filed by the Charging Party on April 1, 2019, and a copy was served on Respondent by U.S. mail on April 3, 2019.

2. (a) At all material times, Respondent has been a limited liability corporation of Delaware with an office and place of business located at 220 Coster Street, Bronx, NY 10474

¹ On March 19 and April 19, 2019, the Region requested that Respondent cooperate in the administrative investigation of the charge in Case No. 02-CA-235116, conducted prior to issuance of the instant Complaint by furnishing certain documents. Respondent failed to fully cooperate in the investigation by refusing to furnish such documents relevant to the disposition of the charge.

(Respondent's facility), and has been engaged in the production and the non-retail sale of baked goods.

(b) In conducting its operations during the 12-month period ending April 25, 2019, Respondent sold and shipped, from its Bronx, NY facility, goods valued in excess of \$50,000 directly to points outside the State of New York.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Dan Wilczynski	-	Executive Vice President
Norman Rich	-	Chief Financial Officer
Daniel Kain	-	Route Manager
Victor Colado	-	Route Manager

5. (a) On or about September 28, 2018, Respondent failed to pay its employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for hours worked.

(b) On or about October 5, 2018, Respondent failed to pay its employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for hours worked.

(c) On or about October 9, 2018, Respondent employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown ceased work concertedly and engaged in a one-day strike in protest of Respondent's failure to pay employees.

6. (a) On or about October 10, 2018, Respondent terminated employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown.

(b) Respondent engaged in the conduct described above in paragraph 6(a) because Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown engaged in the conduct described above in paragraph 5(c) and to discourage employees from engaging in these or other concerted activities.

7. By the conduct described above in paragraph 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

8. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for Respondent's unfair labor practices alleged above in paragraphs 6, the General Counsel seeks an order requiring Respondent to post notices in Spanish, in addition to English.

WHEREFORE, the General Counsel seeks all relief as may be just and proper to remedy the unfair labor practices.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before June 24, 2019, or postmarked on or before June 23, 2019**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively

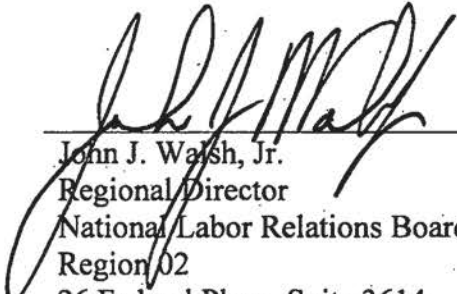
upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on August 6, 2019, at 9:30 am in the Mary Taylor Walker Room on the 36th Floor at 26 Federal Plaza, Room 3614 New York, New York and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this

complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: June 10, 2019



John J. Walsh, Jr.
Regional Director
National Labor Relations Board
Region 02
26 Federal Plaza, Suite 3614
New York, NY 10278-3699

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

RM BAKERY, LLC. D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD
GROUP, LLC

and

Case No. 02-CA-235116

MAKE THE ROAD NEW YORK

AFFIDAVIT OF SERVICE OF: Complaint and Notice of Hearing (with forms NLRB-4338 and NLRB-4668 attached)

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on 6/10/19, I served the above-entitled document(s) by **certified or regular mail**, as noted elow, upon the following persons, addressed to them at the following addresses:

Leaven & Co.,
a wholly-owned subsidiary of BKD Group
Dan Wilczynski
220 Coster Street
Bronx, NY 10474

CERTIFIED MAIL

Make The Road New York
Sarah Leberstein, Senior Staff Attorney
46 Waller Avenue
White Plains, NY 10605

FIRST CLASS MAIL

Make The Road New York
46 Waller Avenue
White Plains, NY 10605

CERTIFIED MAIL

6/10/19

Date

Lisa Coleman, Designated Agent of NLRB
Name

Lisa Coleman

Signature

Affix Stamp Here
(for additional copies of this receipt).
Postmark with Date of Receipt.

2-CA-235116
~~616119~~
6110119



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 02
26 Federal Plz Ste 3614
New York, NY 10278-3699

Agency Website: www.nlr.gov
Telephone: (212)264-0300
Fax: (212)264-2450

June 24, 2019

Dan Wilczynski
Leaven & Co., a wholly-owned subsidiary of BKD Group
220 Coster Street
Bronx, NY 10474

Re: RM Bakery, LLC, D/B/A Leaven & Co., A
Wholly-Owned Subsidiary of BKD Group,
LLC
Case 02-CA-235116

Dear Mr. Wilczynski:

On June 10, 2019, Region 2 of the National Labor Relations Board ("the Board") issued a Complaint and Notice of Hearing ("the Complaint") alleging the Employer in the above matter violated Section 8(a)(1) of the National Labor Relations Act. In accordance with Section 102.20 of the Board's Rules and Regulations, the Employer's Answer to the Complaint was due in our office by June 24, 2019. To date, the Employer has yet to file an Answer. If an Answer is not filed by July 1, 2019, the Region will file a Motion for Default Judgment with the Board.

Very truly yours,

s/Zachary Herlands

Zachary Herlands
Field Attorney

cc: Sarah Leberstein, Senior Staff Attorney
Make The Road New York
46 Waller Avenue
White Plains, NY 10605

F

From: Herlands, Zachary
Sent: Monday, June 24, 2019 5:08 PM
To: normanr@leavenco.com
Subject: Leaven & Co. 02-CA-235116
Attachments: CPT.02-CA-235116.cpt and nhr (1).pdf; LTR.02-CA-235116.no answer.pdf

Dear Mr. Rich,

I will be handling the trial in the above matter. Please find the attached letter, which was mailed via regular mail today. I am also attaching the Complaint, which issued on June 10, 2019. Thank you.

-Zach

Zachary Herlands
Field Attorney
NLRB, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
T: (212) 776-8618
F: (212) 264-2450

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**RM BAKERY, LLC, D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD
GROUP, LLC**

and

Case 02-CA-235116

MAKE THE ROAD NEW YORK

**MOTION TO TRANSFER PROCEEDINGS TO THE BOARD
AND MOTION FOR DEFAULT JUDGMENT**

Pursuant to Sections 102.24 and 102.50 of the Rules and Regulations of the National Labor Relations Board (“the Board”), Counsel for the General Counsel (“the General Counsel”) files this Motion to Transfer Proceedings to the Board and Motion for Default Judgment. The General Counsel is entitled to default judgment in this matter because RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC (“Respondent”) has failed to comply with the requirements for filing an answer to complaint as prescribed by Section 102.20 of the Board’s Rules and Regulations. *See e.g., Malik Roofing Corp.*, 338 NLRB 930 (2003). In support of this motion, the General Counsel submits the following:

1. (a) The charge in this proceeding was filed by Make The Road New York (“the Charging Party”) on January 30, 2019, and a copy was served on Respondent by U.S. mail on February 4, 2019. Copies of the charge and affidavit of service are attached hereto as Exhibits A and B, respectively.

(b) The first amended charge in this proceeding was filed by the Charging Party on April 1, 2019, and a copy was served on Respondent by U.S. mail on April 3, 2019. Copies of the amended charge and affidavit of service are attached hereto as Exhibits C and D, respectively.

2. On June 10, 2019, after investigating the charges, the Regional Director for Region 2 of the Board issued and served upon Respondent by certified mail a Complaint and Notice of Hearing ("Complaint"). Copies of the Complaint and affidavit of service are attached hereto as Exhibits E and F, respectively.

3. In the Complaint served upon Respondent, Respondent was advised that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Complaint by June 24, 2019. The Complaint further advised that if no answer was filed, or if an answer was filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Complaint are true.

4. On June 24, 2019, Region 2 Field Attorney Zachary Herlands sent Respondent a letter by both U.S. mail and via email to Respondent's Chief Financial Officer Norman Rich stating that, to date, Respondent had yet to file an answer to the Complaint within the time specifications required under the Board's Rules and Regulations. The letter notified Respondent that if an answer was not filed by July 1, 2019, the Region would file a Motion for Default Judgment with the Board. Copies of the letter and email are attached hereto as Exhibit G and H, respectively.

5. Following the delivery of the Complaint and the letter described above in paragraph four (4), Respondent has not filed an answer. Based on the foregoing, and because no answer has been filed to the Complaint, all allegations in the Complaint should be deemed to be admitted and found to be true. *Local 297, National Postal Mailhandlers Union*, 367 NLRB No. 144 (2019).

WHEREFORE, the General Counsel respectfully submits that a hearing in this matter is not necessary, and it is appropriate for the Board to issue a Decision and Order without further proceedings. The General Counsel respectfully moves that the Board grant the Motion to Transfer

Proceedings to the Board and Motion for Default Judgment, finding all the allegations in the Complaint to be true and issue an appropriate Remedial Order.

Dated: New York, New York
July 8, 2019

s/Zachary Herlands
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Rm. 3614
New York, NY 10278
Telephone (212) 264-0300
Facsimile (212) 264-2450
zachary.herlands@nlrb.gov

Attachments

**COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO TRANSFER
PROCEEDINGS TO THE BOARD AND MOTION FOR DEFAULT JUDGMENT**

This is to certify that on July 8, 2019, copies of the attached Motion to Transfer Proceedings to the Board and Motion for Default Judgment have been served upon the following in the manner indicated:

Electronically Filed:

Office of the Executive Secretary
National Labor Relations Board
015 Half Street SE
Washington, D.C. 20570

Via Regular and Electronic Mail:

Dan Wilczynski
Norman Rich
RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC
220 Coster Street
Bronx, NY 10474
normanr@leavenco.com

Sarah Leberstein, Esq.
Senior Staff Attorney
Make The Road New York
46 Waller Avenue
White Plains, NY 10605
sarah.leberstein@maketheroadny.org

Dated: New York, New York
July 8, 2019

s/Zachary Herlands
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Rm. 3614
New York, NY 10278
Telephone (212) 264-0300
Facsimile (212) 264-2450
zachary.herlands@nllrb.gov

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**RM BAKERY, LLC, D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD
GROUP, LLC**

and

Case 02-CA-235116

MAKE THE ROAD NEW YORK

**ORDER TRANSFERRING PROCEEDING TO THE BOARD
and
NOTICE TO SHOW CAUSE**

On July 8, 2019, the General Counsel filed with the National Labor Relations Board a Motion to Transfer Proceedings to the Board and Motion for Default Judgment, on the ground that the Respondent has failed to file an answer to the Complaint. Having duly considered the matter,

IT IS ORDERED that the above-entitled proceeding be transferred to and continued before the Board in Washington, D.C., and the hearing scheduled for August 6, 2019 be postponed indefinitely.

NOTICE IS GIVEN that any party seeking to show cause why the General Counsel's motions should not be granted must do so in writing, filed with the Board in Washington, D.C., on or before July 24, 2019 (with affidavit of service on the parties to this proceeding). If a response to this Notice to Show Cause is filed, a party may file a reply to the response within 7 days of receipt of the response (with affidavit of service on the parties to this proceeding), but further responses will not be permitted except where there are special circumstances warranting leave to file such a response.

Dated, Washington, D.C., July 10, 2019.

By direction of the Board:

H

Roxanne L. Rothschild

Executive Secretary

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RM BAKERY, LLC D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD
GROUP, LLC

Cases 02-CA-235116

AND

DATE OF SERVICE July 10, 2019

MAKE THE ROAD NEW YORK

**AFFIDAVIT OF SERVICE OF ORDER TRANSFERRING PROCEEDING TO THE BOARD AN
NOTICE TO SHOW CAUSE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

CERTIFIED & REGULAR MAIL

DAN WILCZYNSKI
LEAVEN & CO., A WHOLLY-OWNED
SUBSIDIARY OF BKD GROUP
220 COSTER STREET
BRONX, NY 10474

CERTIFIED & REGULAR MAIL

SARAH LEBERSTEIN, SENIOR STAFF
ATTORNEY
MAKE THE ROAD NEW YORK
46 WALLER AVENUE
WHITE PLAINS, NY 10605

REGULAR MAIL

MAKE THE ROAD NEW YORK
46 WALLER AVENUE
WHITE PLAINS, NY 10605

E-SERVICE

REGION 02, NEW YORK, NEW YORK
NATIONAL LABOR RELATIONS BOARD
26 FEDERAL PLZ STE 3614
NEW YORK, NY 10278-3699

E-SERVICE

ROBERT GIANNASI, CHIEF ADMINISTRATIVE
LAW JUDGE
DC - DIVISION OF JUDGES
1015 HALF STREET SE
WASHINGTON, DC 20570

Subscribed and sworn before me this
10th day of July 2019.

DESIGNATED AGENT

A Jones

NATIONAL LABOR RELATIONS BOARD

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**RM BAKERY, LLC, D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD
GROUP, LLC**

and

Case 02-CA-235116

MAKE THE ROAD NEW YORK

**THE GENERAL COUNSEL'S MOTION TO
EXPEDITE DEFAULT JUDGMENT AND BOARD ORDER**

On July 8, 2019, Counsel for the General Counsel (the "General Counsel") filed a Motion to Transfer Proceedings to the Board and Motion for Default Judgment with the National Labor Relations Board (the "Board") in response to Respondent's failure to file an answer to the Complaint.¹ On July 10, 2019, the Board granted the General Counsel's Motion to Transfer Proceedings and issued a Notice to Show Cause requiring that any party seeking to show cause why the General Counsel's motions should not be granted do so in writing on or before July 24, 2019. To date, Respondent has yet to respond to the Board's Notice to Show Cause.

As the Complaint alleges, Respondent terminated employees Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown due to their protected activity in violation of Section 8(a)(1) of the Act. Given the seriousness of the allegations, coupled with the likelihood of irreparable harm, Region 2 began the process of seeking injunctive relief pursuant to Section 10(j) of the Act after making a merit determination in this case. However, the Region withdrew its potential request for 10(j) relief after Respondent failed to respond to the Board's

¹ The Complaint was attached to those motions as Exhibit E.

Notice to Show cause, as the case is now with the Board for issuance of an Order. The issuance of such an Order will dissolve any district court injunction issued under Section 10(j) of the Act.

Despite the withdrawal of the potential request for 10(j) relief, the urgency of a final Board Order remains. The terminated employees are still out of work, and with each passing day, the likelihood of chill grows among the remaining employees. In addition, due to their unresponsiveness, it is unlikely Respondent will comply with a Board Order. As such, expedited enforcement and petition for an injunction under Section 10(e) of the Act will be almost certainly sought. Accordingly, given the foregoing, the General Counsel respectfully requests the Board grant the General Counsel's Motion for Default Judgment and expedite its issuance a Board Order to that effect.

Dated: New York, New York
August 5, 2019

s/Zachary Herlands
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Rm. 3614
New York, NY 10278
Telephone (212) 264-0300
Facsimile (212) 264-2450
zachary.herlands@nrlrb.gov

**THE GENERAL COUNSEL'S MOTION TO
EXPEDITE DEFAULT JUDGMENT AND BOARD ORDER**

This is to certify that on August 5, 2019, a copy of the above-titled document has been served upon the following in the manner indicated:

Electronically Filed:

Office of the Executive Secretary
National Labor Relations Board
015 Half Street SE
Washington, D.C. 20570

Via Regular and Electronic Mail:

Dan Wilczynski
Norman Rich
RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC
220 Coster Street
Bronx, NY 10474
normanr@leavenco.com

Sarah Leberstein, Esq.
Senior Staff Attorney
Make The Road New York
46 Waller Avenue
White Plains, NY 10605
sarah.leberstein@maketheroadny.org

Dated: New York, New York
August 5, 2019

s/Zachary Herlands
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Rm. 3614
New York, NY 10278
Telephone (212) 264-0300
Facsimile (212) 264-2450
zachary.herlands@nlrb.gov

From: Herlands, Zachary
Sent: Monday, August 5, 2019 3:24 PM
To: normanr@leavenco.com; Sarah Leberstein
Subject: RM Bakery, LLC d/b/a Leaven & Co. - 02-CA-235116
Attachments: MOT.02-CA-235116.motion for expedited mdj..pdf

Please find the attached Motion, which was e-filed with the Board a moment ago. Thank you.

Zachary Herlands
Field Attorney
NLRB, Region 2
26 Federal Plaza, Room 3614
New York, NY 10278
T: (212) 776-8618
F: (212) 264-2450

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC and Make the Road New York. Case 02-CA-235116

October 8, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that the Respondent, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, has failed to file an answer to the complaint. Upon a charge and amended charge filed by Make the Road New York on January 30 and April 1, 2019,¹ respectively, the General Counsel issued a complaint on June 10 against the Respondent, alleging that it has violated Section 8(a)(1) of the National Labor Relations Act. The Respondent failed to file an answer.

On July 8, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment. On July 10, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.²

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that, unless an answer was received by June 24, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter and electronic mail dated June 24, notified the Respondent that unless an answer was filed by July 1, a motion for default judgment would be filed. Nevertheless, the Respondent

¹ All dates are in 2019 unless otherwise indicated.

² On August 5, the General Counsel filed a Motion to Expedite Default Judgment and Board Order asserting the urgency of a final Board Order to remedy the Respondent's unlawful conduct and to mitigate the resulting chilling effect on the remaining employees' exercise of their Sec. 7 rights. The Respondent also filed no response to this motion. We deny this motion as moot in light of our disposition of the case.

failed to file an answer or request an extension of time to file an answer.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a limited liability corporation of Delaware with an office and place of business located at 220 Coster Street, Bronx, New York 10474 (the facility), and has been engaged in the production and the non-retail sale of baked goods.

During the 12-month period ending April 25, the Respondent sold and shipped, from the facility, goods valued in excess of \$50,000 directly to points outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and/or agents of the Respondent within the meaning of Section 2(13) of the Act:

Dan Wilczynski	-	Executive Vice President
Norman Rich	-	Chief Financial Officer
Daniel Kain	-	Route Manager
Victor Colado	-	Route Manager

2. On or about September 28, 2018, the Respondent failed to pay its employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for hours worked.

3. On or about October 5, 2018, the Respondent failed to pay its employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for hours worked.

4. On or about October 9, 2018, the Respondent employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown ceased work concertedly and engaged in a one-day strike in protest of the Respondent's failure to pay employees.

5. On or about October 10, 2018, the Respondent terminated employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown.

6. The Respondent engaged in the conduct described above in paragraph 5 because Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown engaged in the conduct described above in paragraph 4 and to discourage employees from engaging in these or other concerted activities.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act. The unfair labor practices of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by terminating employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for engaging in protected concerted activity, we shall order the Respondent to offer these employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate the employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, we shall order the Respondent to compensate the named employees for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 2 allocating the backpay award to the appropriate calendar

year for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The Respondent shall also be required to remove from its files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown and to notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.³

ORDER

The National Labor Relations Board orders that the Respondent, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against its employees because they engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, in the manner set forth in the remedy section of this decision.

(c) Compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and within 3 days thereafter, notify the employees in writing that

³ In the complaint, the General Counsel requests that the notice be posted in English and Spanish. We grant this request.

RM BAKERY, LLC D/B/A LEAVEN & CO.

this has been done and that the unlawful terminations will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days of service by the Region, post at its Bronx, New York facility copies of the attached notice marked "Appendix" in both English and Spanish.⁴ Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 8, 2019

John F. Ring, Chairman

Lauren McFerran, Member

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

William J. Emanuel

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate you because you engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, less any net interim earnings, plus interest, and WE WILL also make those employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

agreement or Board order, a report allocating the back-pay awards to the appropriate calendar year for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

RM BAKERY, LLC D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD GROUP,
LLC

The Board's decision can be found at <http://www.nlr.gov/case/02-CA-235116> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

M BAKERY, LLC D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD
GROUP, LLC

and

MAKE THE ROAD NEW YORK

Case 02-CA-235116

DATE OF SERVICE October 8, 2019

AFFIDAVIT OF SERVICE OF DECISION AND ORDER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

CERTIFIED & REGULAR MAIL

DAN WILCZYNSKI
LEAVEN & CO., A WHOLLY-OWNED
SUBSIDIARY OF BKD GROUP
220 COSTER STREET
BRONX, NY 10474

REGULAR MAIL

MAKE THE ROAD NEW YORK
46 WALLER AVENUE
WHITE PLAINS, NY 10605

E-SERVICE

ROBERT GIANNASI, CHIEF ADMINISTRATIVE
LAW JUDGE
DC - DIVISION OF JUDGES
1015 HALF STREET SE
WASHINGTON, DC 20570

CERTIFIED & REGULAR MAIL

SARAH LEBERSTEIN, SENIOR STAFF
ATTORNEY
MAKE THE ROAD NEW YORK
46 WALLER AVENUE
WHITE PLAINS, NY 10605

E-SERVICE

REGION 02, NEW YORK, NEW YORK
NATIONAL LABOR RELATIONS BOARD
26 FEDERAL PLZ STE 3614
NEW YORK, NY 10278-3699

Subscribed and sworn before me this
8th day of October 2019.

DESIGNATED AGENT
L. Carter

NATIONAL LABOR RELATIONS BOARD



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 2
26 Federal Plz Ste 3614
New York, NY 10278-3699

Agency Website: www.nlrb.gov
Telephone: (212)264-0300
Fax: (212)264-2450

October 15, 2019

Dan Wilczynski
Leaven & Co., a wholly-owned subsidiary of BKD Group
220 Coster Street
Bronx, NY 10474

Re: RM Bakery, LLC, D/B/A Leaven & Co., A
Wholly-Owned Subsidiary of BKD Group,
LLC
Case 02-CA-235116

Dear Mr. Wilczynski:

Enclosed is a copy of the Board Decision and Order in the above matter that issued on October 8, 2019. Please let me know by October 29, 2019 whether or not RM Bakery, LLC, D/B/A Leaven & Co., A Wholly-Owned Subsidiary of BKD Group, LLC, hereinafter referred to as Respondent, intends to comply with the Board's order. If Respondent does not intend to comply with the Board's order, this matter will be referred for enforcement proceedings in the appropriate United States Court of Appeals.

In anticipation of Respondent's willingness to comply, this letter discusses what Respondent needs to do to comply with the Board's order.

Post Notice: Enclosed are 5 copies of the Notice to Employees in English and Spanish. A responsible official of the Respondent, not Respondent's attorney, must sign and date the Notices before posting them. The Notices should be conspicuously displayed where notices to employees are customarily posted for a period of 60 consecutive days at Respondent's facility in Bronx, NY. Respondent must take reasonable steps to ensure that the Notices are not altered, defaced or covered by other material. If additional Notices are required, please let me know. During the posting period, a member of the Regional Office staff may visit Respondent's facility to inspect the Notices.

Remedial Actions:

Production of Documents: The Board's order provides that Respondent will make whole Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown and provide the necessary records, in electronic form, if available, to enable the Regional office to analyze the amount due pursuant to the Board's order. In this regard, it is requested that Respondent provide copies of the following documents to the undersigned within 14 days from the date of this letter:

K

RM Bakery, LLC, D/B/A Leaven & Co., A - 2 -
Wholly-Owned Subsidiary of BKD Group,
LLC
Case 02-CA-235116

October 15, 2019

- Documents reflecting the hours worked and the wages earned by the above-mentioned employees during the period 6 months prior to the date of their termination.
- Documents reflecting any benefits received by employees of the Employer, including health and retirement benefits.

Excess Tax Liability: The Board's Order provides that Respondent will compensate any employee who receives backpay under the Board's Order for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

Report Allocating Backpay: As provided in the Board's Order, Respondent will file with the Regional Director, at the address listed below, the completed Report of Backpay Paid Under the National Labor Relations Act, which is enclosed for your convenience:

National Labor Relations Board, Region 2
Attn: John J. Walsh, Jr., Regional Director
26 Federal Plaza, Ste 3614
New York, NY 10378

Reinstatement: The Board's Order provides that Respondent will offer Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown immediate and full reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his/her/their seniority or other rights and privileges previously enjoyed. A copy of the letter offering them reinstatement should be furnished to the undersigned within **21 days** from the date of the Board's order.

Expunge Records: The Board's Order provides that Respondent will expunge its records of any reference of the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown within 14 days of the Board's Order and, within 3 days thereafter, notify them that this has been done. A copy of the letter notifying them that their records have been expunged should be furnished to the undersigned within **21 days** from the date of the Board's order.

Certification of Compliance: Certification of Compliance forms are enclosed. Certification of Compliance, Part One addresses all communication means by which Respondent has complied with the Board's requirement to inform employees of the signed Notice to Employees and should be completed and returned with one signed and dated Notice(s) in English and Spanish within 14 days of receipt of this letter. The Certification of Compliance, Part Two addresses affirmative actions Respondent is required to take pursuant to the Board's order and should be completed and returned by not later than 21 days of receipt of this letter. If the Certification of Compliance and signed Notice(s) are returned via e-file or e-mail, no hard copies of the Certifications of Compliance or Notice(s) are required.

RM Bakery, LLC, D/B/A Leaven & Co., A - 3 -
Wholly-Owned Subsidiary of BKD Group,
LLC
Case 02-CA-235116

October 15, 2019

Closing the Case: When all of the affirmative provisions of the Board's order have been fully complied with and there are no reported violations of its negative provisions, you will be notified that the case has been closed on compliance. Timely receipt of the signed and dated Notices and required sworn Certification of Compliance forms will assist the Region in closing the case in a timely manner.

Your cooperation in this matter will be appreciated.

Very truly yours,

Christen Middleton Ritter
Supervisory Field Examiner

Enclosures: Board Decision and Order
Notices to Employees English
Notices to Employees Spanish
Certification of Compliance Form, Part One
Certification of Compliance Form, Part Two
Sample Report to Social Security

cc: Sarah Leberstein, Senior Staff Attorney
Make The Road New York
46 Waller Avenue
White Plains, NY 10605



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 02
26 Federal Plz Ste 3614
New York, NY 10278-3699

Agency Website: www.nlr.gov
Telephone: (212)264-0300
Fax: (212)264-2450

October 15, 2019

[Via Regular Mail]

Dan Wilczynski
Norman Rich
Leaven & Co., a wholly-owned subsidiary of BKD Group
220 Coster Street
Bronx, NY 10474

Re: RM Bakery, LLC, d/b/a Leaven & Co., A
Wholly-Owned Subsidiary of BKD Group,
LLC
Case 02-CA-235116

Dear Mssrs. Wilczynski and Rich:

On October 8, 2019, the National Labor Relations Board issued the enclosed Decision and Order. (See: <https://www.nlr.gov/cases-decisions/decisions/board-decisions>). On October 10, 2019, I emailed Mr. Rich, asking whether Respondent will comply with the Board Decision and Order. To date, I have yet to receive a response. Please advise whether Respondent will, in fact, comply with such Board Decision and Order. If I do not receive a response, or you respond that Respondent will not comply, the Agency will likely file enforcement papers in federal court soon.

Very truly yours,

s/Zachary Herlands

Zachary Herlands
Field Attorney

L



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 02
26 Federal Plz Ste 3614
New York, NY 10278-3699

Agency Website: www.nlrb.gov
Telephone: (212)264-0300
Fax: (212)264-2450

October 29, 2019

[Via Regular Mail and E-Mail normanr@leavenco.com]

Dan Wilczynski
Norman Rich
RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group
220 Coster Street
Bronx, NY 10474

Re: *RM Bakery, LLC, d/b/a Leaven & Co., A
Wholly-Owned Subsidiary of BKD Group,
LLC*
Case 02-CA-235116

Dear Mssrs. Wilczynski and Rich:

On October 8, 2019, the National Labor Relations Board issued the enclosed Decision and Order. (See: <https://www.nlrb.gov/cases-decisions/decisions/board-decisions>). On October 10, 2019, I emailed Mr. Rich, asking whether Respondent will comply with the Board Decision and Order. On October 15, 2019, Supervisory Field Examiner Christen Ritter mailed you a demand letter with enclosures regarding compliance in the above matter. On that same date, I mailed you a letter again asking whether the Respondent would comply with the Board Order.

To date, Respondent has not replied to any of the Region's correspondence and has not notified the Region that it intends to fully comply with the Board Order. As such, the Region is referring this matter to the NLRB's Enforcement Litigation Branch after which enforcement proceedings in federal court will likely begin. If, however, Respondent wishes to comply with the Board Order, or if it decides in the future that it will comply, please notify the Region immediately.

Very truly yours,

s/Zachary Herlands

Zachary Herlands
Field Attorney

Enclosures

M

RM Bakery, LLC, d/b/a Leaven & Co., A Wholly-
Owned Subsidiary of BKD Group, LLC

- 2 -

October 29, 2019

cc. Sarah Leberstein, Esq.
Senior Staff Attorney
Make The Road New York
46 Waller Avenue
White Plains, NY 10605
sarah.leberstein@maketheroadny.org



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 5
BANK OF AMERICA CENTER, TOWER II
100 S. CHARLES STREET, STE 600
BALTIMORE, MD 21201

Agency Website: www.nlr.gov
Telephone: (410)962-2822
Fax: (410)962-2198

November 5, 2019

RM Bakery, LLC, D/B/A Leaven & Co., A Wholly-Owned Subsidiary
of BKD Group, LLC
Attn: Dan Wilczynski, Executive Vice President
220 Coster Street
Bronx, NY 10474

Re: RM Bakery, LLC, D/B/A Leaven & Co., A Wholly-
Owned Subsidiary of BKD Group, LLC
Case No. 02-CA-235116

Dear Mr. Wilczynski:

On October 8, 2019, the National Labor Relations Board issued its Decision and Order in the above-captioned case, which required RM Bakery, LLC, D/B/A Leaven & Co., A Wholly-Owned Subsidiary of BKD Group, LLC to take certain affirmative actions. Thereafter, you were requested to initiate compliance with the Board's Order. To date, you have not notified this Office that Respondent intends to comply with the Board's Order.

This letter is to advise you that today I recommended that enforcement proceedings be instituted in this matter.

If Respondent currently wishes to comply with the Board Order, or if it decides in the future that it wishes to comply, please notify this Office immediately.

Very truly yours,

A handwritten signature in black ink, appearing to read "John J. Walsh, Jr.", is written over the typed name and title.

John J. Walsh, Jr.
Regional Director

cc:
Make The Road New York
Attn: Sarah Leberstein, Esq., Senior
Staff Attorney
46 Waller Avenue
White Plains, NY 10605



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

November 6, 2019

Clerk, United States Court of
Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square, Room 1702
New York, NY 10007

Re: *NLRB v. RM Bakery, LLC d/b/a Leaven
& Co., a wholly-owned subsidiary of BKD
Group, LLC*, Board Case No. 02-CA-
235116

Dear Ms. Wolfe:

I am emailing to the Court at newcases@ca2.uscourts.gov a copy of the Board's application for summary entry of a judgment enforcing the Board's order in this case and a proposed judgment.

Please serve a copy of the application on Respondent, whose address appears on the service list. I have served a copy of the application and proposed judgment on each party admitted to participate in the Board proceedings, and their names and addresses appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of all correspondence the Court sends to counsel in this case, and a copy of the judgment issued.

Very truly yours,

David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570
(202) 273-2960

cc: Service List

N

SERVICE LIST

RESPONDENT:

Dan Wilczynski, Exec. VP
RM Bakery, LLC d/b/a Leaven &
Co., a wholly-owned subsidiary of
BKD Group, LLC
220 Coster Street
Bronx, NY 10474

Phone: (718) 472-3036
Fax: (718) 472-3037

RESPONDENT:

Norman Rich - CFO
RM Bakery, LLC d/b/a Leaven &
Co., a wholly-owned subsidiary of
BKD Group, LLC
220 Coster Street
Bronx, NY 10474

Email: normanr@leavenco.com

**THE BOARD IS NOT AWARE OF
A COUNSEL FOR RESPONDENT**

CHARGING PARTY:

Make The Road New York
46 Waller Avenue
White Plains, NY 10605

Phone: (914) 948-8466
Fax: (914) 948-0311

CHARGING PARTY COUNSEL:

Sarah Leberstein, Esq.
Make The Road New York
46 Waller Avenue
White Plains, NY 10605

Phone: (914) 948-8466 Ext: 1008
Fax: (914) 948-0311
Email: sarah.leberstein@maketheroadny.org

REGIONAL DIRECTOR:

John J. Walsh, Jr.
National Labor Relations Board
26 Federal Plaza, Ste 3614
New York, NY 10278-0104

This Court has jurisdiction over this application under Section 10(e) of the Act (29 U.S.C. § 160(e)). Venue is proper in this Circuit because the unfair labor

practices occurred in the State of New York. The Board's final order issued on October 8, 2019, and is reported at 368 NLRB No. 90.

B. Proceedings Before the Board

1. On June 10, 2019, the General Counsel issued a complaint and notice of hearing in Case No. 02-CA-235116, charging Respondent with certain violations of the Act. The complaint, in part, advised the Respondent that under the Board's Rules (29 C.F.R. 102.20 and 102.21), the Respondent was required to file an answer by June 24, 2019, and that if the Respondent failed to file an answer, the allegations of the complaint would be deemed to be true.

2. Having not received an answer, counsel for the General Counsel, on June 24, 2019, sent the Respondent a letter advising that if no answer was received by July 1, 2019, the Board's Regional Office would file a Motion for Default Judgment with the Board.

3. The Respondent did not file an answer.

4. On July 8, 2019, counsel for the General Counsel filed with the Board a Motion for Default Judgment based upon the Respondent's failure to file an answer to the complaint.

5. By order dated July 10, 2019, the Board transferred the case to itself and issued a Notice to Show Cause, giving Respondent until July 24, 2019, to file with the Board in Washington, D.C., a response to the Motion for Default Judgment.

6. Respondent did not file a response.

7. The Board, on October 8, 2019, issued its Decision and Order, granting the Motion for Default Judgment in the absence of good cause being shown for Respondent's failure to file a timely answer, and entering an appropriate order against the Respondent.

C. The Board Is Entitled to Summary Enforcement of Its Order

On these facts, the Board is entitled to summary enforcement of its order against Respondent. Where a respondent in a Board proceeding fails to file an appropriate answer to the unfair labor practice complaint in a timely manner, the Board may, pursuant to Board Rule 102.20, absent a showing of "good cause," deem the complaint's allegations admitted, and then may enter an order, essentially by default, against the respondent. No cause for Respondent's failure to file an answer was alleged or shown here.

It is settled that the Board is entitled to have that default judgment summarily enforced. Under Section 10(e) of the Act (29 U.S.C. § 160(e)), no objection that has not been urged before the Board shall be considered by a court of appeals "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Interpreting that requirement, courts have consistently held that a respondent's failure to assert any defense before the Board entitles the Board, absent extraordinary circumstances, to summary

enforcement of its order. *See e.g., KBI Security Service, Inc. v. NLRB*, 91 F.3d 291, 295 (2d Cir. 1996); *NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 435 (2d Cir. 2001); *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984); *NLRB v. Aaron Convalescent Home*, 479 F.2d 736, 738-39 (6th Cir. 1973). No such circumstances have been alleged or shown here.

WHEREFORE, the Board respectfully requests that the Court, after serving notice of the filing of this application on Respondent, enter judgment summarily enforcing the Board's order in full. A proposed judgment is attached.

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570

Dated in Washington, D.C.
this 6th day of November, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

RM BAKERY, LLC D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD GROUP, LLC

Respondent

:
:
: No.
:
: Board Case No.:
: 02-CA-235116
:
:
:

CERTIFICATE OF SERVICE

The undersigned certifies that one copy each of the Board's application for summary entry of judgment and proposed judgment, in the above-captioned case, has this day been served by first class mail upon the following parties at the address listed below:

Dan Wilczynski
RM Bakery, LLC d/b/a Leaven &
Co., a wholly-owned subsidiary
of BKD Group, LLC
220 Coster Street
Bronx, NY 10474

Norman Rich - CFO
RM Bakery, LLC d/b/a Leaven &
Co., a wholly-owned subsidiary
of BKD Group, LLC
220 Coster Street
Bronx, NY 10474

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
this 6th day of November, 2019

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: November 08, 2019

Docket #: 19-3716

Short Title: National Labor Relations Board v. RM Bakery,
LLC

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Agency #: 02-CA-235116

Agency: NLRB

SERVICE OF FILING APPLICATION FOR ENFORCEMENT

Pursuant to FRAP 15(c) you are hereby served with the enclosed application for enforcement of an order of National Labor Relations Board, in the above-entitled case that was filed in this Court on November 8, 2019. Please note that this application is denominated as an Application for Enforcement for Entry of Summary Judgment.

Inquiries regarding this case may be directed to 212-857-8546.



**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

ROBERT A. KATZMANN
CHIEF JUDGE

Date: November 08, 2019

Docket #: 19-3716

Short Title: National Labor Relations Board v. RM Bakery,
LLC

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Agency #: 02-CA-235116

Agency: NLRB

NOTICE BARRING A CORPORATION FROM PROCEEDING PRO SE

An Application for Enforcement has been filed in this Court in the above referenced case naming an incorporated business as an appellate party. It appears that the corporate party is not represented by counsel in this case.

An incorporated business, even if solely owned, is prohibited from appearing pro se in this Court. See 28 U.S.C. § 1654; Berrio v. New York City Housing Authority, 564 F. 3d 130, 132-133 (2d Cir. 2009).

If an attorney admitted to practice in this Court does not file a notice of appearance on behalf of the incorporated business by December 9, 2019 the corporate party will be deemed in default on the appeal. An unrepresented corporate party's brief will not be accepted for filing and when the appeal is placed on a calendar for determination by the Court, the unrepresented corporate party will not be heard at oral argument, except by permission of the Court.

Inquiries regarding this case may be directed to 212-857-8546.

P

MANDATE

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of December, two thousand nineteen.

Present:

Peter W. Hall,
Debra Ann Livingston,
Richard J. Sullivan,
Circuit Judges.

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

RM BAKERY, LLC D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD GROUP, LLC

Respondent

:
:
: No. 19-3716
:
: Board Case No.:
: 02-CA-235116
:
:
:

JUDGMENT ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before:

This cause was submitted upon the application of the National Labor Relations Board for summary entry of a judgment against Respondent, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, its officers, agents, successors, and assigns, enforcing its order dated October 8, 2019, in Case No. 02-CA-235116, reported at 368 NLRB No. 90, and the Court having considered the same, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, its officers, agents, successors, and assigns, shall abide by said order (See Attached Order and Appendix).

Q

Mandate shall issue forthwith.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


Catherine O'Hagan Wolfe

NATIONAL LABOR RELATIONS BOARD

v.

RM BAKERY, LLC D/B/A LEAVEN & CO.,
A WHOLLY-OWNED SUBSIDIARY OF BKD GROUP, LLC

ORDER

RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Terminating or otherwise discriminating against its employees because they engaged in protected concerted activities.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, in the manner set forth in the remedy section of this decision.
 - (c) Compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

- (d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful terminations will not be used against them in any way.
- (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (f) Within 14 days of service by the Region, post at its Bronx, New York facility copies of the attached notice marked "Appendix" in both English and Spanish. Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2018.
- (g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES
COURT OF APPEALS ENFORCING AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate you because you engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, less any net interim earnings, plus interest, and WE WILL also make those employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor

Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

**RMBAKERY, LLC D/B/A LEAVEN & CO., A WHOLLY-OWNED
SUBSIDIARY OF BKD GROUP, LLC**

The Board's decision can be found at <http://www.nlr.gov/case/02-CA-235116> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

